

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY A. QUANDT)	
Claimant)	
VS.)	
)	
IBP, INC.)	Docket No. 184,591
Respondent)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant and the Workers Compensation Fund requested the Appeals Board to review the Award dated May 27, 1997, entered by Administrative Law Judge Floyd V. Palmer. The Appeals Board heard oral argument on November 26, 1997. Appeals Board Member Gary Korte recused himself from this proceeding and Stacy Parkinson of Olathe, Kansas, was appointed by the Director to serve as Appeals Board Member Pro Tem.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for the claimant. Craig A. Posson of Dakota City, Nebraska, appeared for the respondent. Derek R. Chappell of Ottawa, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the record contains, and the Appeals Board has considered, the deposition of Nancy R. Downs taken on January 30, 1997.

ISSUES

The Administrative Law Judge awarded claimant a 79.25 percent permanent partial general disability for injuries sustained on March 26, 1993, and assessed the entire award against the Workers Compensation Fund. The issues before the Appeals Board on this review are:

- (1) Did claimant injure her neck in the March 26, 1993, accident?
- (2) What is the nature and extent of claimant's injuries and disability due to the March 26, 1993, accident?
- (3) What is the liability of the Workers Compensation Fund?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be affirmed.

- (1) On March 26, 1993, claimant slipped on a piece of fat and fell onto her right knee. As a result of that accident, claimant injured her right knee and aggravated a preexisting condition of degenerative cervical disc and osteophytic disease in her neck. All four doctors who testified indicated the accident either aggravated or accelerated claimant's preexisting neck condition.
- (2) As a result of the March 1993 accident, claimant underwent an anterior cervical discectomy and fusion at the C3-4 and C4-5 intervertebral spaces.
- (3) Claimant now has a 48 percent whole body functional impairment as a result of the March 26, 1993, accident.
- (4) Since recovering from surgery, claimant has reapplied for employment with respondent and believes she might be able to perform the full-time clerical position she held on the date of accident. Respondent has neither offered nor returned claimant to work.
- (5) Claimant's husband also works for the respondent. When he was promoted and transferred to Nebraska, claimant moved with him. Since leaving respondent's employment, claimant has worked two part-time jobs. For four or five months, claimant worked at a pizza restaurant for \$4.50 per hour but terminated because she could not lift ice to place it into a soda machine. On June 10, 1996, claimant began working for an insurance agency filing documents and answering the telephone. That job pays claimant

\$4.75 per hour and claimant works either 16 or 20 hours per week depending upon her schedule.

(6) As a result of the accident, claimant should observe the following medical restrictions and limitations: no looking overhead or keeping her neck in a flexed position; no turning her head to the left or right; lifting no greater than 15 pounds on an occasional basis (and to the waist level only); and no kneeling, squatting, stair climbing, or walking over one-half mile in an eight-hour day. There is no medical restriction limiting the number of hours claimant can work.

(7) Claimant has lost 85 to 90 percent of her ability to perform work in the open labor as a result of the March 1993 accident. Previously claimant had undergone numerous surgeries. At the time of her March 1993 accident, claimant was under certain temporary restrictions while recovering from arm surgery. When analyzing claimant's loss of ability to perform work in the open labor market, vocational expert Jerry Hardin limited claimant's pre-injury open labor market to the medium, light, and sedentary physical labor categories which the Appeals Board finds appropriate.

(8) On the date of accident, claimant's average weekly wage was \$323.74. Because claimant testified she is unable to work full time, claimant's post-injury ability to earn wages is best reflected by multiplying her current hourly rate of \$4.75 by the 20 hours per week she sometimes works which yields a \$95 per week wage. Comparing claimant's pre- and post-injury wages, the Appeals Board finds claimant has a 71 percent loss of ability to earn a comparable wage.

(9) Claimant would not have sustained either permanent injury or impairment to either her neck or right knee if it were not for the preexisting conditions in both.

(10) Before the March 1993 accident, respondent had knowledge of claimant's preexisting neck and right knee conditions. When claimant applied for employment with respondent in May 1985, she wrote in her medical history questionnaire that she had previously undergone a cervical fusion. Claimant had undergone a two-level cervical fusion in 1981 and a partial right knee replacement around 1990 or 1991. As the nature of those conditions would adversely affect claimant's ability to obtain or retain employment with some employers, the Appeals Board finds that before March 1993 claimant was more probably than not a "handicapped" worker as that term is defined by K.S.A. 44-566.

(11) The Appeals Board hereby adopts the findings set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above and to the extent they are supported by the evidentiary record.

CONCLUSIONS OF LAW

(1) Because hers is an “unscheduled” injury, the formula to compute claimant’s permanent partial general disability is contained in K.S.A. 1992 Supp. 44-510e which provides in pertinent part as follows:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

Despite claimant’s contention that she is permanently and totally disabled from engaging in any substantial and gainful employment, the Appeals Board finds claimant retains the ability to perform sedentary work. Considering claimant’s 85 to 90 percent loss of ability to perform work in the open labor market and her 71 percent loss of ability to earn a comparable wage, the Appeals Board finds claimant has a 79.25 percent permanent partial general disability as a result of the March 1993 accident.

(2) The Workers Compensation Fund is responsible for all of the costs and benefits associated with this Award.

Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers’ compensation fund. K.S.A. 1992 Supp. 44-567(a)(1).

As indicated above, the Appeals Board finds the respondent had the requisite knowledge of claimant’s preexisting neck and right knee impairments. Also, claimant’s ultimate disability most likely would not have occurred but for her preexisting impairments. Therefore, the Workers Compensation Fund is responsible for this award pursuant to the above-quoted statute.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated May 27, 1997, entered by Administrative Law Judge Floyd V. Palmer should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Nancy A. Quandt, and against the Workers Compensation Fund for an accidental injury which occurred March 26, 1993, and based upon an average weekly wage of \$323.74 for 71 weeks of temporary total disability compensation at the rate of \$215.84 per week or \$15,324.64, followed by 344 weeks at the rate of \$171.05 per week or \$58,841.20, for a 79.25% permanent partial general disability, making a total award of \$74,165.84.

As of December 31, 1997, there is due and owing claimant 71 weeks of temporary total disability compensation at the rate of \$215.84 per week or \$15,324.64, followed by 177.71 weeks of permanent partial disability compensation at the rate of \$171.05 per week in the sum of \$30,397.30 for a total of \$45,721.94, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$28,443.90 is to be paid for 166.29 weeks at the rate of \$171.05 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

DISSENT

Claimant retains the ability to perform sedentary work only. Even then, claimant's physical condition is such that she is able to work, at most, only 20 hours per week. The majority has ignored, without justification, claimant's uncontroverted testimony of her diminished capabilities. As indicated by claimant's employment history, claimant is a hard-working, motivated individual. I find claimant's testimony credible and uncontroverted

that she is unable to work full time. She has established she is essentially unemployable and, therefore, has established a permanent, total disability. See Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993), for the proposition that the capacity to perform part-time sedentary work does not necessarily indicate that a person is capable of performing substantial and gainful employment.

BOARD MEMBER

DISSENT

I disagree with the majority's finding that claimant only retains the ability to work 20 hours a week post-accident. There are no medical restrictions limiting the number of hours claimant is able to work. Claimant testified she could return to the full-time clerical position she was performing at the time of her injury. In fact, claimant was performing that job while on temporary light duty restrictions at the time of her accident. Following her release to return to work, claimant sought to return to work full time for respondent. She also applied for other full-time jobs. Claimant must have believed that she could perform those jobs when she applied for them. Therefore, I would determine claimant's wage-earning ability based upon a standard 40-hour work week.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Craig A. Posson, Dakota City, NE
Derek R. Chappell, Ottawa, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director